UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHNSON & JOHNSON HEALTH CARE SYSTEMS INC.,	.	
Plaintiff,	.	Case No. 22-cv-02632
vs.	.	Newark, New Jersey
	.	February 28, 2023
SAVE ON SP, LLC,	.	
Defendant.	.	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CATHY L. WALDOR
UNITED STATES MAGISTRATE JUDGE

APPEARANCES (the parties appeared via Zoom videoconference):

For the Plaintiff:

JEFFREY J. GREENBAUM, ESQ.
Sills Cummis & Gross P.C.
The Legal Center
One Riverfront Plaza
Newark, NJ 07102-5400
(973) 643-7000
jgreenbaum@sillscummis.com

HARRY SANDICK, ESQ.
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2723
Hsandick@pbwt.com

Audio Operator:

Transcription Service:

KING TRANSCRIPTION SERVICES
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973) 237-6080

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

(APPEARANCES continued)

For the Defendant:

ANDREW R. DUNLAP, ESQ.
Selendy Gay Elsberg PLLC
1290 Avenue of the Americas
New York, NY 10104
(212) 390-9005
Adunlap@selendygay.com

MEREDITH NELSON, ESQ.
Selendy Gay Elsberg PLLC
1290 Avenue of the Americas
New York, NY 10104
(212) 390-9069
mnelson@selendygay.com

E. EVANS WOHLFORTH, ESQ.
Gibbons P.C.
One Gateway Center
Newark, NJ 07102-5310
(973) 596-4879
ewohlforth@gibbonslaw.com

(Proceedings already in progress)

THE COURT: -- tell me about the meet-and-confers, because this letter is really you yelling at each other through me.

MR. SANDICK: So, Your Honor, do you want us to address this first?

THE COURT: Yes.

MR. SANDICK: Sure. So this is an issue that actually arises in our letter and to some -- and also in the letter for SaveOn. And what it comes down to is we are seeking discovery about the health plans that are participants in what we call the "SaveOn Program." And we're seeking information about the patients that are in this SaveOn program.

Our primary objective in obtaining that information, both categories, is not about third-party discovery, at least not right now.

THE COURT: Right.

MR. SANDICK: What it's about is -- and I can explain the reason for it. So with respect to patients, knowing who the patients are is important, even if we never serve a single subpoena or interview a single witness, because what we want to see is these are patients who participate in our co-pay support program, which is called

"CarePath." They also participate in the SaveOn program.

And what we want to see is how do their care -- how do the CarePath co-pay support payments that we make change, how do they increase when someone goes on the SaveOn program?

And we also want to be able to compare how our CarePath patients, what their co-pays are compared to those patients who are on SaveOn. We think they're going to be a lot higher based on what we know, what we've alleged, what survived the motion to dismiss.

And if we don't have their names, the process of matching up the people becomes incredibly convoluted and probably impossible. And we need to do that in order for our damages analysis, for one thing, in order to see how the amounts go up based on SaveOn's misappropriation of the CarePath co-pay support. So it's important for damages.

In addition, patient deception and part of our GBL 349 claim. And how do we prove patient deception without knowing what the patient communications are, what SaveOn said internally? And this is where -- you know, we will at some point need to talk to patients in order to prove our case about the deception of patients.

And so we have no interest in inflicting commercial harm on anyone. We think the real issue here is are we going to be allowed to prove up our case in terms of damages and in terms of patient deception? And we need this information.

And, of course, we'll abide by the protective order in this case, and we'll abide by the federal rules of civil procedure, which already place significant limitations. We can't just go out and force people to talk to us. We can call someone and ask to interview them. That's been approved by courts from time immemorial. And if they say "No" and we want to subpoena them, there'll be an opportunity for the witness to object, for SaveOn to object, for the Court to rule, if it comes to you. So we're not looking to end-run or hurt anyone's business or go after -- I think is the term that is used a lot.

And the names of the health plans, it's a similar rationale. In the motion to dismiss that was just decided -- and we expect to see echos of this in summary judgment -- the argument that SaveOn makes is that health plans are really making the decisions here, that what we allege to be something that SaveOn is doing, they say in their motion, really, it's the health plans.

Well, how do we know that? Because we get discovery about and potentially from the health plans. And, again, if we get documents that are so thoroughly redacted that we can't figure out what's going on because names are redacted, because locations are redacted, it will be impossible for us to make use of that.

And, again, we're not seeking to go after health

plans or hurt anyone's business. There are ample protections in the federal rules. If we transgress those, I'm sure SaveOn and the Court will step in. But we don't have any intention of doing that.

There is also, I think, for the health plans, these are sophisticate -- two other points to make, briefly. The health plans are sophisticated entities. We've subpoenaed one so far. A lawyer called us a few days later. We set a schedule for objections. We're going to have a meet-and-confer. It's going to proceed just like normal discovery.

The patients -- one salient fact which I left out, the identity of the patients in CarePath is known to JJHCS. And that's because we're paying their co-payments. They have to sign up with us. They're our business partners too.

And so when SaveOn says, "Well, we don't want to tell you the names of these people," they're not -- they're just preventing us from matching up our records and their records. We know who's on CarePath. We're giving them money. We've helped two million patients with co-pay support in the CarePath program. So the idea of, like, holding back the names of the patients that are already known to us only prevents us from making the match we need to make for damages purposes and for proving patient deception.

And so that's why we're seeking that information in

our motion in unredacted form subject to a protective order and why we oppose the idea of a -- of a new protective order that would be entered specifically to bar us from talking to witnesses, many of whom are our own business partners.

So, anyway, I may have gone on too long, Your Honor. But I wanted to make those points.

MR. DUNLAP: May I respond, Your Honor?

THE COURT: Yes, of course.

MR. DUNLAP: Thank you.

I was a little puzzled to hear my friend on the other side talking about redacting information or holding back names. That is all in the past.

What we're moving on here is simply whether there will be a protective order -- or an order from the Court that would limit the number of plans or patients that Johnson & Johnson could subpoena or interview in the first instance.

THE COURT: Why?

MR. DUNLAP: Okay. So I want to put this in context, Your Honor. This is not an ordinary business dispute where there's some contract or even a business tort disagreement that the parties can resolve and sort of walk away.

Johnson & Johnson is targeting SaveOn's entire business. Right? They are seeking an injunction that would shut down how SaveOn operates. They want to put us out of

business. And there's case law, as the Court is aware, that allows the Court to limit discovery where there could be harm or burden to a party, and there's the -- the Court is required to limit discovery where it could be duplicative of discovery sought from another party or a third party.

And as you heard from Mr. Sandick, Johnson & Johnson wants to subpoena or interview -- it has said in writing also -- SaveOn's clients in addition to the patients who belong to those clients' plans. And they've already subpoenaed one of those plans indicating they're not even waiting for party discovery to be done before they go after that. And they have not disclaimed an intent to go after significant numbers of the plans or even the patients. So our concern is that subpoenas or outreach for a large number of plans or patients could harm SaveOn's business.

Now, Mr. Sandick gave the example of Premera, which is a big sophisticated entity. It has served millions of people. But many of my client's clients are small businesses or unions or even government entities. Many don't have internal counsel at all. Many don't have internal litigators. These are entities that would need to go out and hire counsel, spend money -- in some cases taxpayer money -- to deal with Johnson & Johnson subpoenas or outreach.

And the concern is that this could pressure clients when faced with a choice between dealing with Johnson &

Johnson subpoenas or outreach or dropping SaveOn's services, to drop those services now or decide to do so in the contracts -- their current contracts with SaveOn expire. And that could be very commercially harmful to SaveOn.

Now, we are not trying to prevent Johnson & Johnson from learning the names of the patients or from learning the names of the plans. What we're trying to do is ensure that there's not some large-scale outreach to the plans, especially to the plans, that could harm our business here.

And we don't show -- Johnson & Johnson has given reasons why it needs the names of patients to run damages. They also say they want to talk to some of the patients about client harm. They don't really give, at least to our mind, a good reason why they need to speak to the health plans. The argument we make in the motion to dismiss is that SaveOn cannot set plan terms on its own. That's a matter of federal law. It's also a part of contracts. This should all be clear from the productions they're going to get from SaveOn. So we don't think they have a strong reason for wanting to speak to the plans at all.

And from what we've seen, the one subpoena they've served on Premera is highly duplicative of information that they've already sought from us. They seek from Premera, for example, documents showing the relationship between Premera and SaveOn, documents concerning the financial benefit that

SaveOn has provided Premera, documents concerning the terms and conditions of CarePath itself. All of this is stuff that they can get from the discovery they've served on SaveOn or that they have already.

We don't think that Johnson & Johnson needs discovery on this scale. Certainly not now. We think it is marginal at best, and we think it would be grossly disproportionate to the sort of harm that could befall us.

And when they say, "Oh, don't worry about it. The federal rules already protect you if we serve -- go out and serve a bunch of subpoenas. That will give you a chance to object and move to quash," and all the rest of it, the service of the subpoena, the outreach itself, could accomplish the very harm that we are concerned about.

So we had proposed a limit on the number that they could go after in the first instance, subject to them coming back and us agreeing, if they should -- if we produce documents and it shows reason for them to talk to us, a plan, or speak to a patient, we might well agree to that. And they could come back to Your Honor and make a showing of good cause.

THE COURT: Well, good cause is discovery. I mean, if this were the case in any business case, you'd be arguing or defense would be arguing, you're going to hurt our business.

They're entitled to discovery. I don't know that they're going to hurt your business. We have no proof of that. We have no examples of.

I just -- your general objections are not making sense to me.

MR. DUNLAP: I'm making representations, Your Honor, about the nature of many of our clients who are not sophisticated entities of the sort that the other side describes who don't always have internal counsel.

I mean, if the Court wants more of a showing, I suppose we could go back and give more information to Your Honor, exactly what the client list looks like.

But what we're very concerned about, given that Johnson & Johnson is out to put my client out of business, is that they could serve a mess of subpoenas, especially on clients. The mere fact of receiving those could pressure the clients to drop SaveOn's services and thereby impose commercial harm. We're not trying to stop them from getting the discovery they need. We're just trying to make sure that it's phased and there are limits so that they can't get more than what they need or seek more than what they need in a way that would harm us.

THE COURT: So you want to limit their prosecution of this case.

MR. DUNLAP: Your Honor, what I'm asking you to do

is to set a reasonable limit -- we proposed five plans or patients, but that's not a magic number -- whatever Your Honor thinks is appropriate -- above what -- that they could go out and subpoena today, if they wanted to. But above which they couldn't go --

THE COURT: But you're not -- if it's five, you're not worried about those five subpoenas injuring your business.

MR. DUNLAP: We are concerned about the aggregate effect. We have thousands of clients. Those clients have hundred of thousands of patients. We are worried about some broad-based service of subpoenas on clients, especially on clients that could pressure them to drop or renegotiate their terms with SaveOn.

If Johnson & Johnson wants to talk to some reasonable number of plans or some reasonable number of patients, we're fine with that.

What we're worried about is the scale of them going after, you know, scores or hundreds of plans with subpoenas or outreach, because at that point their argument that they have unique information to seek from any of the plans gets a lot weaker.

So, you know, we tried to engage them in terms of a reasonable limit. They didn't want to discuss any limit at all. You asked us to have a meet-and-confer. That's sort of

how they went.

But we would ask you to do is impose some sort of reasonable limit at the beginning.

And, again, that's not -- for all time. They can come back and make a showing or come to us and make a showing. And if we think they have a good reason, we would consent that. And, of course, if you did, you could order something more broad.

We're just asking to strike a balance, Your Honor, here, between the risks that we face if they go out to a large number of people and allowing them to get the discovery they need. We're really not trying to slow anybody down here or deny them anything.

We have a large number of documents that we've reviewed that we'd be willing -- that we're able to turn over in the next week or two except that they have plan names or patient identities, and we really want to get this resolved in a way that protects our client's business.

THE COURT: Mr. Sandick, do you want to respond?

MR. SANDICK: Yeah, briefly. So, first, I'm glad to hear Mr. Dunlap tell us that they're going to give us the documents with the names and patients -- names of patients and the names of health plans. That was not my understanding based on our meet-and-confer. That's not meant to cast aspersions on Mr. Dunlap, who -- we know each other for many

years. But I was not aware of that prior to this call. But I think that's a positive step.

In terms of the limitations, in addition to the federal rules, I mean, the Court has set a discovery schedule in this case. Substantial completion of document production is in June. Expert discovery's supposed to begin in the fall. We're not going to serve 100,000 subpoenas on patients. We're not going to serve 1,000 or 2,000 subpoenas on health plans or anything like that. We have no intention to do that. I don't think there's a litigation purpose. I don't think it's feasible in the context of this case. But even if it were feasible, I don't think we would do it because there's no litigation purpose.

But the issue is this: When you're talking, for example, about patients -- and we know this from experience with, let's say, borrower discovery in cases involving mortgage fraud -- you reach out to 20 people. You might not -- you might find two of them or one of them, especially in a case where people are suffering from serious illness. We don't know if we served, let's say, 20 subpoenas, whether even one of those people would be in a position to participate in this case at all.

So then we would, in Mr. Dunlap's world, have to come back to him every five patients. And then if he says "No," we'd have to come back to Your Honor every five

patients. There's just no basis for this.

If we had -- as a hypothetical that I don't think will ever occur. But if we had served, you know, 1,000 subpoenas on patients and they came in to complain about this, it would at least be a logical thing presented for the Court, queued up for the Court.

But on the current situation, there's no reason to think we're going to do anything bad. We have no interest in destroying anyone's business. That's not the objective of the lawsuit.

The objective of the lawsuit are the two claims that we've brought. We think that money that should be going to patients is being taken by SaveOn. We want it to stop.

But unless -- what they're saying is their whole business is taking money that we intend to go to one person and giving it to someone else; that's their whole business, I -- you know, that's -- we're not intending to shut down any businesses. We're just prosecuting the claims we have.

THE COURT: Well, I --

(Simultaneous conversation)

THE COURT: -- this discussion -- hold on.

I think this discussion needs to be tabled until after you have the names and you can ascertain how many subpoenas you're going to issue.

I do think there's an issue of proportionality,

Mr. Dunlap. Just so you understand, I am not saying that they should issue 10,000 subpoenas. But don't you think that it's more readily discussed once they have the names and they can ascertain what their target is in terms of subpoenas?

MR. DUNLAP: Your Honor, I think we'd be very open to that if it was understood that they wouldn't be going out and serving subpoenas until we could have some sort of discussion about an upper limit.

And I just want to thank you. I think the wisdom of how you've set this up is becoming apparent, because it Mr. Sandick is hearing some things from me that I thought I had communicated. I'm hearing some new stuff from him for the first time here.

We're not wedded to a limit of five. He says, well, they may go out and subpoena 20 patients. Okay. Then let's set the limit -- the initial limit at 20. You know, we're not round just saying they have to come back every one or two or five people. What we want to avoid is additional -- disproportionate harm that comes from going after a huge number of people.

And if Your Honor wants to stage it such that we produce the documents, it's understood that they're not going to serve any subpoenas, we meet and confer and try agree on an initial limit, and then if we can't agree on a limit, we come back and you resolve that before any subpoenas or

informal interviews go out, I think we'd be open to that.

MR. SANDICK: Your Honor, one thing that Mr. Dunlap mentioned at the end that I think is important is it's not just subpoenas that he's trying to prevent. It's any contact with patients. And these are patients who CarePath pays, co-pays support -- they're our business partners too.

I object to any limit on informal communications --

THE COURT: Okay.

MR. SANDICK: -- with --

(Simultaneous conversation)

THE COURT: That's different. I think that's different.

Mr. Dunlap, go ahead.

MR. DUNLAP: Sorry. I just want to be clear -- we would be producing the patient lists and the client lists on an attorneys' eyes only business --

THE COURT: Yes.

MR. DUNLAP: To the extent that they are saying, well, what we're doing would interfere with their current business operations, that it'll prevent anyone in the Johnson & Johnson business side, including folks at CarePath, from speaking to any CarePath patient, that's not true. That's not what we're asking for.

What we're seeking is a limit on the litigation counsel going out and trying to interview patients about the

litigation in addition to subpoenaing them.

So I just want to make that --

(Simultaneous conversation)

THE COURT: That's a different.

MR. DUNLAP: I am not trying to monkey with their current business operations or the current operation of CarePath, just to be clear.

THE COURT: Okay. But why shouldn't they be able to contact patients?

MR. DUNLAP: It is a matter -- well, again, we think they should be able to contact a reasonable number of patients.

Our concern is about the scale, because once they start talking to a large number of patients -- and, again, these are folks who don't have their own litigators on speed-dial -- they get a call from Johnson & Johnson saying, "Hey, we would like to speak to you. Do you think you were deceived? Do you think you were misled? You know, we have this big lawsuit going on," et cetera, some number of them are going to get antsy and upset and, perhaps, complain to their plan sponsors, and those plan sponsors could then complain to SaveOnSP --

THE COURT: But then -- they're their patients. I -- they're their patients.

MR. DUNLAP: Well, let's be quite clear about this.

They're members of healthcare plans that are run by employers who are our clients.

Johnson & Johnson sells them drugs that the plans pay most of the costs for. So they're Johnson & Johnson's patients to the extent that they buy a drug from Johnson & Johnson giving them some sort of co-pay assistance program.

But they're our patients. They're the patients of our clients' healthcare plans. I shouldn't say "ours." They're not SaveOn's patients directly. They're the patients of SaveOn's clients. And so if Johnson & Johnson goes and says, "Hey. You know, there's this problem with the SaveOn program, and we have this allegation and that allegation and the other allegation" -- which we all strongly contest, by the way -- the patients could get stressed. The patients could get confused. And they could go complain to their plan administrators, who our clients, and say, "Wait a minute. There's something going on here. Is my speciality drug at risk," et cetera. And if you get enough of those complaints as a plan administrator, you could say, "You know what? It might not be worth it to go forward with SaveOn's services." But that would be a form of commercial harm to us.

It would also, frankly, harms the plans because they would lose the benefit of the program. And it could harm the patients as well because they wind up paying a bit more for their speciality drugs.

So, again, we're not trying to shut them down and say they can't --

THE COURT: If you want me to restrain them from contacting people that use their drugs, that's an odd request.

MR. SANDICK: And, Your Honor, they agree to our terms and conditions as part of the CarePath program. We have a business relationship with them. We have a healthcare relationship with them. They sometimes make, you know, phone calls that have nothing to do with the issues of funding because we also -- CarePath also has programs that involve, you know, nursing assistance and other types of aid to people who are on Johnson drugs.

You know, it's really unprecedented for a plaintiff to say that they get to control (A) who you interview as part of your fact investigation. I've never heard of that. I've never seen that. None of the cases they cite provide for that. Even, frankly, to discuss, you know, the contents of our subpoenas before they go out, they have opportunity to object to them, just like everybody else. And there's nothing about this case that is any different from all the other cases that are in this district or any other district, for that matter. And I've just never seen a court say, "You can't talk to people who are your patients in your program who agree to your terms and conditions if you have a case,"

and if they say, "No, I don't want to talk to you," we want to subpoena them, that subpoena goes through the normal process.

But informal interviews of witnesses are essential to the operation of our civil litigation system. It would not work without it. If you could only talk to someone after the other side gives you permission, that's just the inverted world of how civil litigation operates.

MR. DUNLAP: If I may respond, Your Honor. Once again -- what we're actually asking the Court is not to shut J&J down from speaking to any patients or even a decent number of patients. Mr. Sandick said, well, he might go to speak to 20 of them. That would be fine with us as an initial limit.

What we're trying to put a cap on is the number of patients that they could go to where the value of any additional discovery they may get pales against the threat of commercial harm that could result to SaveOn if they speak to a large number of patients who get antsy and then complain to their plans and are then pressured to drop SaveOn's services.

So just as informal witness interviews are part of discovery, so are limits on discovery where there is a threat of duplication of cumulativeness --

THE COURT: Or proportionality. Or proportionality.

And we're way too early. And I am not going to issue prior restraints on who they can interview and who they can't interview. For now -- we discussed the subpoenas with respect to interviewing, especially people that use their services. I am not going to put a prior restraint on that.

If, in fact, there is a problem, maybe you can discuss a number -- I am not ordering this, Mr. Sandick, and Mr. Dunlap -- a number of patients that you want to interview. But how can I stop him from talking to his patients?

(Simultaneous conversation)

THE COURT: It's an extraordinary request.

MR. DUNLAP: Your Honor, we don't -- if we were asking to stop him from speaking to any of his patients, that might be extraordinary.

We are simply asking him to limit it to a number where he can't impose commercial harm on us by doing so --

(Simultaneous conversation)

THE COURT: -- that number? Is the number 10? Is it 20? Is it 50? Is it 75? How do we know that number? That's where the speculative nature of this comes in. There's nothing to say that 10, 20, or 60 or 70 or 200 is going to harm your business --

(Simultaneous conversation)

MR. DUNLAP: And I think, Your Honor, that that's

what your -- what I understood your proposal to be, I think makes sense, which is as long as we understand that there is currently a restriction on them subpoenaing or interviewing patients or plans, we then produce the lists of names. We'll start producing documents that have this, and then they should come to us and say what they think -- how many they want to go after. And it can be, you know, a rough number. That's fine. And then we can talk about whether we think that that's at a scale that could really harm --

THE COURT: No. No. I'm not going to do that. I'm not going to do that.

With respect to the subpoenas, that's another issue. They're talking about interviewing people that use their services. I can't possibly put a prior restraint on -- it's a First Amendment issue. They can talk to whoever they want. I mean, whether or not it hurts your business -- and that is the basis of your request for a protective order -- you have given me no real cause other than speculation that it's going to hurt your business.

So I don't think this issue is completely fleshed out. I think you give them the names. We discuss the subpoena issues. The two of you can discuss that and see what's proportionate.

But I cannot and will not stop them from interviewing people that use their services.

MR. DUNLAP: May I ask for clarification, Your Honor?

THE COURT: Sure.

MR. DUNLAP: I heard what you said on the patients.

Does that -- what about the plans? We understand there's a moratorium on subpoenas until we produce the names. We've talked about a number --

THE COURT: I am not -- a moratorium.

I'm suggesting that the two of you meet and confer and discuss the issuance of subpoenas. There's no moratorium.

First, you'll produce the list of patients and who -- and whatever plans that are on the list.

Then you will discuss -- because it's clear to me, you haven't discussed a lot -- how many subpoenas Mr. Sandick chooses to issue. If he says 100 and you say 20, then you come to me.

The burden for a protective order here is proof positive that harm would be caused. I don't have that from you. I really don't.

So, again, this is a little bit speculative -- a lot speculative on your part.

He will discuss with you the number of subpoenas. Insofar as -- and maybe I am not clarifying what you want -- contacting patients that do business with J&J in any way,

shape, or form, he can call whoever he wants.

MR. DUNLAP: We understand on those two points.

I'm ask -- Your Honor, I'm asking an additional point, which is -- so there's subpoenas that they could -- so there are two groups at issue. There's the plans --

THE COURT: Yes.

MR. DUNLAP: -- who are -- who are our clients. Right?

And then there are the patients who are members of those plans.

THE COURT: Right.

MR. DUNLAP: What I understand on subpoenas, we give them -- we're going to give them the lists of patients and list of plans.

Then they will come to us and say roughly how many they want to issue. If we can agree, great. If we can't, we come to you.

THE COURT: Yes.

MR. DUNLAP: Informal outreach to patients, what I understand you're saying, there's no limits. They can talk to whomever they want.

My question was on informal outreach to plans who are our clients who don't have a direct business relationship with J&J or at least not one -- most of them don't have one here. They're simply the entity that pays for the drugs.

Whether you were anticipating that that would fall on the "give them the list and let's discuss" side of the line along with the subpoenas or whether you treat that like the patient.

THE COURT: Okay. I understand.

So, Mr. Sandick, these plans, if you know, are they plans that you deal with? I mean ...

MR. SANDICK: So we deal with the plans from time to time in certain contexts. We do not have direct contracts with the plans because that's just not the role of JJHCS or even J&J more broadly in the system.

My view on this is, you know, I think, as a practical matter, I don't know us getting a lot of informal cooperation from health plans because these are often -- and I hear what Mr. Dunlap's saying -- some of them may not be large, but many of them -- these are, like, Blue Cross Blue Shield-type entities -- these are huge entities, and if I call them up and ask to just chat with them, they'll probably tell me, like, "Come back with a subpoena." So I don't know that there's going to be, as a practical matter.

But as a principled matter, the idea -- and -- of prior restraint on our talking to anyone just strikes me as wrong, contrary to law, contrary to the ordinary civil procedure --

THE COURT: I agree.

MR. SANDICK: So I don't want to be barred from it, but I can assure the Court, I don't think that's going to be a terribly fruitful path because these are large entities with well -- you know, they have fine attorneys. No doubt. And they will not view the informal cooperation that a patient, who might well have reached out to us with a complaint in the past about SaveOn -- you know, that's a different story.

THE COURT: So I agree, you can contact whatever plan and/or patient you want to.

I would just, you know -- I am not trying to mess with your strategy, but I would keep Mr. Dunlap advised. And if he sees an emergent situation arise, I can deal with it in that manner as it arises.

MR. SANDICK: Sure. Sure, Your Honor --

(Simultaneous conversation)

THE COURT: I am not -- restraining from talking to anybody.

MR. SANDICK: Thank you.

MR. GREENBAUM: Your Honor, could I just address the subpoenas for a moment?

We don't have the names yet.

THE COURT: Right.

MR. GREENBAUM: We don't know how many subpoenas we want to issue, and it may be an iterative process. We may

start off with three or five, and then depending on what we get, we'll do -- so --

(Simultaneous conversation)

THE COURT: That's what I thought: You would probably stage it in such a way that you -- you know, if you get a return on your subpoena or you get cooperation, you get information, then you can issue more. I mean, that seems to be a pyramid way of building discovery without --

(Simultaneous conversation)

THE COURT: Go ahead.

Jeff, I'm sorry.

MR. GREENBAUM: I mean, we can start off and say to Mr. Dunlap, you know, we're going to do 25. Is that too much?

You know, we don't know how many we're going to want. We're going to use one iterative process possibly. So that's why Rule -- I'm forgetting which rule, but the discovery rules will work the way they are. If we're abusive, they can come to court.

But this whole application is premature and unfounded and speculative. We shouldn't have to --

THE COURT: Okay. I don't disagree with you.

I'm just trying to make peace here.

So I think that, you know, Mr. Dunlap gets the picture that five is never going to work and that I'm

entitling you to prosecute your case to the best of your ability. That's the message in this conversation.

My interim discussion with respect to subpoenas was to hopefully have Mr. Sandick and Mr. Dunlap and whoever else have discussions and make some agreements so that we -- I don't have to sit here and have six months of appeal to a district judge and then back to me and then -- you know, I'm just trying to circumvent, Jeff, the ongoing dispute process which will waylay and delay this case continually, because I can see that nothing's going to be easy in this case. I think we all agree.

So let's just go by discuss the subpoenas, and if Mr. Dunlap says, "Hey, this is outrageous, you're killing me," then you can come back to me.

MR. DUNLAP: Understood, Your Honor.

MR. GREENBAUM: Thank Your Honor.

THE COURT: So what else can we discuss? I actually had a cancellation; so we have a few more minutes --

(Simultaneous conversation)

THE COURT: Go ahead --

(Simultaneous conversation)

MR. DUNLAP: I was just going to say, I know that there are letter -- there are outstanding issues from J&J. There are also some issues that we've put in. There's one bundle of issues that we think is critical to our side, which

I would like to have the opportunity to --

THE COURT: Your financial returns. Documents showing why J&J has CarePath.

MR. DUNLAP: Yes. The -- right. The --

THE COURT: The CarePath and Janssen drugs.

MR. DUNLAP: Right. The development and marketing and administration of CarePath and financial information -- historical financial information about Janssen drugs.

THE COURT: Yeah. I don't know that I have enough on that, but can we talk about a little bit?

MR. DUNLAP: Yes.

THE COURT: So what relevance -- and I know these are relevant to your defense in your submission, you say.

What relevance would documents showing J&J financial returns have to your defense?

MR. DUNLAP: And, again, I just want to clarify what we're asking for.

THE COURT: Okay.

MR. DUNLAP: It is not every financial document within Johnson & Johnson. It's a large company with many lines of business.

What we're focused on is historical information about why CarePath itself, that program was developed, how it's administered, how it's marketed, including analysis of the return on investment in that program. And on the Janssen

drug side, we certainly don't want all the -- you know, the medical information and the lab tests and all of that.

What we want is financial information about how they set prices and why they have raised Janssen prices over the year. And it is -- remember, CarePath -- to Janssen drugs.

So why is this relevant? Let me take a shot at trying to explain.

THE COURT: Okay.

MR. DUNLAP: So Johnson & Johnson in this case is telling a very simple but we think misleading story. Their story is that speciality drug prices are just high and that they have come along and for the good of patients set up CarePath to help them afford the co-pays so they can get their speciality drugs and that my client, SaveOn, came along and is somehow maliciously ciphering [sic] funds away from these patients for its own benefit and the benefit of the plans, and then they say this harms patients and this harms -- and it harms JJHCS.

But we have a different story and, we think, accurate story to tell, which is that Johnson & Johnson jacks up the prices of these speciality drugs, not because it's required by any development of the drug but just because it can, to increase its profits.

And it developed CarePath as a marketing tool so

that more patients would take its drugs as opposed to a competitor's drugs and would keep taking those drugs so that it can continue to make money. And these drugs can be a gold mine.

And so CarePath -- Johnson & Johnson makes a very high return on investment, we believe, on its CarePath program. So, for example, Stelara, that's one of the drugs at issue in this case. The total cost of that per year, assuming a patient uses it the full year -- and most of these are for chronic conditions -- is $165,000. Balversa, which is another speciality drug at issue, the average cost annually is $240,000. So if they can pay out $5,000, 8,000, and even $10,000 in CarePath funds to make sure that a patient takes a drug where they get $240,000, that's a very, very good return on their investment.

And in the federal system, in the federal system, the same program has been rejected by the Department of Health and Human Services. HHS called this and the Second Circuit agreed that this type of program is a kickback, which is not allowed under antikickback statute.

So the entities that wind up paying for these high drug plans are the health plans: SaveOn's clients. And so the clients have tried to figure out ways and SaveOn has tried to help them to take full advantage of the co-pay assistance funds that Johnson & Johnson has on offer. And we

don't think there's anything nefarious about the plans doing this. Indeed, it would be surprising if they didn't do this sort of thing. They're fiduciaries. They are required to administer plan assets for the benefits of the patients and implementing the sort of terms that SaveOn advises them to save the plans money and ensures that patients pay nothing for these drugs.

So that information, we think is critically relevant to the following allegations at a minimum that Johnson & Johnson has made. It says in its GBL claim, that what SaveOn does threatens the financial viability of CarePath, which, it says, is a public harm. Right?

But we don't think that CarePath is a public good. And we think that it exists solely to increase Johnson & Johnson's profits. And we want to be able to show that any impact we're having on its program, its ability to sell this is not a public harm of any sort.

Second, J&J says that SaveOn harms patients by increasing their healthcare costs because under the terms of these plans, CarePath funds don't across -- against out-of-pocket maximums. But we intend to show, among other things, that rising costs here are driven primarily by increases in speciality drug prices, including by Johnson & Johnson's decision to raise these prices simply because it can, for no other reason. That goes to whether this is

actually a public harm or not.

Third, Johnson & Johnson says it was damaged by what SaveOn does, by advising plans to set these terms that increase the CarePath payments that Johnson & Johnson makes. And they say only look at how much our CarePath payments have gone up. That's our damages.

But we don't think that can put this man behind -- don't -- "pay no attention to this man behind the curtain" approach. Right? We intend to show that the SaveOn approach here actually leads to more patients signing up for Janssen drugs, using Janssen drugs and signing up for CarePath and so that Johnson & Johnson may actually make money in total, if you look at the return on its Janssen drugs as a result of what SaveOn is doing, and certainly if they lost money, it's not just limited to -- it's not as big as they claim it is. You have to look at the profits they're making off of their drugs, not simply how much they're paying out in CarePath funds.

And, finally, they're seeking a permanent injunction to shut us down, to stop us from administering this program. You heard Mr. Sandick accuse us of theft, basically. And what we intend to show under that standard is that J&J is not suffering any real injury that would require an injunction and certainly that an injunction would not serve the public it is.

So, again, Johnson & Johnson's basic approach here has been that they want to produce a narrow set of documents that will support their own theory of liability and damages. But we think it's critical to get these documents because they're critical to our theories that there was -- there is no liability and they have not actually been damaged.

(Simultaneous conversation)

THE COURT: Mr. Sandick, do you want to respond?

MR. SANDICK: Yes, I do. Thank you.

The -- nothing that Mr. Dunlap said is tethered in any way to elements of the torts that we have alleged in this case, the elements that Judge Vazquez stated in his recent motion to dismiss.

None of the -- even if it is true that the prices of speciality drugs are high, that does not create a defense or justification for committing torts or violating GBL 349. The question is not -- and it's just not relevant to the case -- is CarePath a good program? CarePath is not a defendant in this case. The question is does SaveOn harm the public by deceiving consumers? They say that if Johnson & Johnson, the company broadly speaking, is still making money on developing and selling therapies, then it's okay for SaveOn to induce patients to tortious -- it violate the terms and conditions of their agreement with JJHCS. And that just can't be true. There's no legal basis for it. It doesn't

touch to anything. These are completely irrelevant documents.

What they would like to do is make this into a case about the question whether drug prices in America are high, whether they are too high, and whether it's, therefore, okay for SaveOn and the health plans to try to grab some money back by increasing co-pays and inducing patients to breach the terms and conditions. We never said in our complaint that there was, you know, harm to plans. What we talked about was the harm to the patients because of the deception, because a patient shows up and says, "I'm here for my medication" -- which, by the way, it's not a matter of, like, mercy or kindness that the health plans are paying for these speciality drugs. They're paying for it because people have purchased insurance and they are paying premiums for insurance. And some people who pay premiums, the way the system works, don't get sick and don't draw down very much. But some people do get sick, badly sick, with cancer, immunological conditions. And so when that patient goes to the pharmacy and is told "You're not covered" and actually they are covered but they're being told they're not covered because they haven't signed up to SaveOn, that's patient deception. And whether the cost of the drug is a dollar or a hundred thousand dollars, it makes no difference to this case.

What they are seeking to do is bog down the plaintiff in irrelevant discovery, by the way, on a vast scale. Request 30, this is just literally what they are asking for, Judge -- from January 1st, 2009, to the present -- so eight years before the allegations in the complaint -- for each year, for each Janssen drug -- and there are 40 Janssen drugs, more than 40, that are part of CarePath, we want all documents and communications regarding -- for Janssen's decision to raise or lower the price of the Janssen drug, including labor or manufacturing costs or an increase the efficiency of the Janssen drug -- this would result in -- in order to reply to this, we would have hundreds of custodians. We would have to review millions and millions of documents all in an issue that's entirely irrelevant, that's being injected into the case of hoping of changing the case about a tortious interference and consumer harm into a case about drug prices are just too high.

So whether they are too high or not too high creates no justification for the offenses that we charged in the complaint. So completely irrelevant discovery that is also incredibly burdensome should not be permitted.

We have actually, though, made an offer -- to be fair, we have offered a compromise. We have offered to produce the following: All documents relating to harm caused

by SaveOn; all of the data that's formed the basis for the allegations in our complaint, of course, we're producing; the co-pay assistance budget at JJHCS, actual and projected for all the patients involved in CarePath to the extent we have the data -- and we do have some of the data; the dates of enrollment; how much was offered; how much was paid to each patient; what drug they took; from 2016 to 2022 -- one year earlier than SaveOn even existed. SaveOn didn't exist until 2017. But they want -- eight years before they were created to write a term paper about drug prices, I suppose.

We've offered them what are called the "Janssen transparency reports." Every year Janssen issues reports that address drug costs. And we're producing documents that reflect how JJHCS determines the level of support.

We're also producing documents about the drafting history of the terms and conditions going back to 2017 and about the understanding about the very specific term and condition that's the issue that's under dispute in the case. There's this language in our terms and conditions that says offer may not be used with any other offer. To the extent that there are people within J&J talking about that going back to 2017, we will produce that document. So they will get all of this.

And what I'm saying here is if they get all of this and they still need more, it's obviously all about prejudice.

But to, on day one of discovery, say we need to go eight years before the allegations of complaint and get every document relating to the manufacturing and labor costs and efficacy of the Janssen drugs? I mean, that is the whole business, just in part -- the plaintiff JJHCS, but of multiple affiliates and thousands of employees at this company. This is being done to burden us and also, I would say, to discourage other plaintiffs who might look at SaveOn and say, "This is not a good thing. This is not fair to patients or to us." They should know, if SaveOn is allowed to get this discovery, that bringing a case will lead to an immense burden on them. Huge, huge disproportionate, irrelevant discovery.

THE COURT: Okay. Let me just stop you.

I am running out of time clearly for my next conference.

But, Mr. Sandick, when do you think substantial completion of your production will occur? Or do you have date? I don't have it at hand.

MR. SANDICK: So we expect to make an initial production, I would say -- well, we have initial production of org charts and other materials. We expect to make productions on these and other issues in approximately two weeks. The substantial completion date for document discovery, I believe, is in June. For the CarePath

enrollment data, we are going to have that by the end of April. It's an immense of data. But we're gathering it, and that will be produced by the end of April. So some of this in March; more of it in April; all of it by the beginning of June, which is the discovery schedule in the case.

THE COURT: Okay.

Mr. Dunlap, I am not trying to cut you off, but I have to move on. So once they do their production, why don't we renew your applications at that time and either have a Zoom or an in-person with substantial amount of time that we can discuss this and you can try and convince me of the relevance of your requests.

MR. DUNLAP: Your Honor, I'm glad to resume discussing this whenever it's convenient for the Court.

I do want to signal, however --

THE COURT: Okay.

MR. DUNLAP: -- that getting -- we're not asking for anything near the volume that Mr. Sandick said we were.

But we are asking for a good amount of information here. And if we have to wait several months for him to make these productions before we renew the request and then Your Honor requires them to produce that information later, that is going to lead to a pretty significant -- we would think, extension of discovery schedules so he can gather it, he can produce it, and our experts can go through -- because

it will be a decent amount of material.

Now, I understand that you're out of -- you are running low on time here. You know, we have multiple responses to what Mr. Sandick said. He said it wasn't in the complaint.

It's in black and white in their allegations. It's highly, highly relevant what they're offering it is the sleeves off their vest. It's stuff that they believe is relevant to prove their theory but not to allow us to rebut. And it is critical that we have this information in order to rebut.

I'm glad to go through jot by jot. It sounds like you don't have the time for that right now.

THE COURT: Not today. But you want -- you want to further this discussion prior to substantial completion?

MR. DUNLAP: That would be our preference, Your Honor, because, again, we understand you want to keep things moving here and if we're waiting, you know, two, three months more than that, to get the production --

THE COURT: Okay.

MR. DUNLAP: -- I mean, if we can tell you right now that if Mr. Sandick produces limited amount of stuff that he's talked about that only goes back to 2017 or 2016, doesn't go back to when terms and conditions were drafted, doesn't go back and tell us the full history of CarePath,

doesn't include the information we need about return on investment, we're going to be asking that -- for that information in three months, and we know that we need it now.

So it might be more effective --

THE COURT: Okay.

MR. DUNLAP: -- if we can talk about it in the near future.

THE COURT: Is there a preference for in-person or Zoom?

MR. DUNLAP: My own preference, Your Honor, is I would always rather be in person, but we'll do whatever you prefer.

MR. SANDICK: We agree with Mr. Dunlap.

THE COURT: Okay. And --

MR. GREENBAUM: Your Honor, we have requested and pending since January 5th, that we would like to get production on, so is Your Honor going to be addressing those items too? Because Mr. Sandick only had the opportunity to address the --

(Simultaneous conversation)

THE COURT: I have a 2 o'clock Zoom, Jeff.

MR. GREENBAUM: I understand.

THE COURT: Or I only -- I was lucky to get an hour for this today just because of the cancellation.

So why don't I bring you in in person in the next

couple of weeks and we can continue this.

MR. GREENBAUM: Okay. Thank you.

THE COURT: So if the date's posted and somebody's got a problem with it, get back to my chambers immediately.

MR. SANDICK: Thank you, Your Honor. We will.

THE COURT: All right. I'm sorry, folks. I'll see you soon. Thank you.

UNIDENTIFIED SPEAKERS: Thank you.

(Conclusion of proceedings)

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 44 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

S/ *Sara L. Kern* 1st of March, 2023

Signature of Approved Transcriber Date

Sara L. Kern, CET**D-338
King Transcription Services
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973) 237-6080